ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL GRIFFEN, JUDGE

DIVISION III

CACR07-702

January 30, 2008

GERALD JERMAINE ALLEN APPELLANT	AN APPEAL FROM CRITTENDEN COUNTY CIRCUIT COURT [CR97-1085A]
V.	HON. RALPH WILSON, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED; MOTION TO BE RELIEVED AS COUNSEL IS GRANTED

This is a no-merit appeal from the revocation of appellant Gerald Allen's probationary sentence. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j)(1), appellant's counsel submitted a no-merit brief and a motion to be relieved as counsel, asserting that there is no non-frivolous argument to be made in support of an appeal. Appellant filed *pro se* points for reversal; accordingly, the State filed a responsive brief, asserting that appellant's arguments are either not preserved for review or that an appeal therefrom would be wholly without merit. We affirm the revocation of appellant's probation and grant counsel's motion to be relieved.

I. Facts

Appellant was placed on probation on July 17, 1998, after pleading guilty to burglary and theft of property. He was sentenced to ten years' supervised probation and to an additional five years' unsupervised probation. As a condition of receiving probation, appellant was ordered to pay a total of $3719 in costs, fees, and restitution.

On August 10, 1999, the State filed a petition to revoke appellant's probation, asserting that he failed to report to his probation officer as directed and failed to pay probation fees, fines and costs. Because appellant was incarcerated on other charges from October 2000 until May 2006, no revocation hearing was held until March 27, 2007.

The State presented two witnesses: Deborah Wiseman, collector of fines for the Crittenden County Sheriff's office, and Kyle Bruce, appellant's probation/parole officer. Wiseman testified, without objection, that appellant originally owed $3719 and owed $4206 as of August 1, 2006. The ledger sheet, which was admitted into evidence without objection, shows that appellant never paid any money as ordered. Wiseman further testified that appellant never contacted her office to explain why he never made a payment.

Bruce testified that appellant was currently under Bruce's supervision due to his probationary sentence and because he had been paroled on May 10, 2006, in an unrelated case. Bruce testified that appellant failed to pay any of his supervision fees relating to his probation.[1] He also testified that appellant had failed to comply with several of his parole conditions, including failing to report on two occasions and exceeding the parameters of his

[1]Bruce incorrectly testified that appellant's supervision fees were the same as his parole fees, which were $25 per month. The record shows that appellant's supervisory fees were $15 per month.

electronic monitoring device. However, Bruce admitted that appellant would not be able to report or pay fines during his period of incarceration, from October 2000 until May 2006.

Appellant offered no testimony to explain his nonpayment. The trial court revoked appellant's probationary sentenced based solely on his failure to pay, finding that he inexcusably failed to pay as ordered. The court excluded the time that appellant was incarcerated but noted that he made no payment from July 17, 1998, through October 2000, when he was incarcerated, and thereafter made no payment after May 10, 2006, when he was released. The trial court sentenced appellant to serve five years on the residential burglary charge, the minimum sentence for that offense (but ordered no time based on the theft-of-property charge).

II. Adverse Rulings

A defense attorney may file a no-merit brief and request to withdraw as counsel if, after a conscientious examination of the record, he believes that an appeal would be wholly frivolous. *See Anders*, *supra*. In so doing, counsel must file a brief discussing all adverse rulings that might arguably support the appeal and explaining why each adverse ruling does not provide a meritorious ground for reversal. *See Eads v. State*, 74 Ark. App. 363, 47 S.W.3d 918 (2001). This court is bound to perform a full examination of the proceedings as a whole to decide if an appeal would be wholly frivolous. *See Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001).

As appellant raised no objections during the revocation proceeding, the only adverse ruling was the decision to revoke his probation, which is an adverse ruling that must be

addressed by counsel seeking to withdraw from representation. *See generally Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004). To revoke a probationary sentence, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation. Ark. Code Ann. § 5-4-309(d) (Repl. 2006); *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). The State bears the burden of proof, but need only prove that the defendant violated a single condition. *Id*. When appealing from a revocation determination, a defendant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. *Id*. Evidence that is insufficient for a criminal conviction may be sufficient to revoke a probationary sentence. *Id*.

As counsel argues, an appeal from the revocation of appellant's probation would be wholly frivolous because the State proved by a preponderance of the evidence that appellant inexcusably failed to pay his fines and costs as ordered. Here, Wiseman's testimony and the payment ledger, which were admitted without objection, demonstrated appellant's failure to pay. The burden then shifted to appellant to present a reasonable excuse for his failure to pay. *See Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990). As appellant presented no evidence to excuse his failure to pay, the trial court was permitted to find that his failure to pay was inexcusable. *See Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

Further, no meritorious appeal would lie based on the sentence imposed. The sentence imposed was proper because it was within the range of the sentence that could have

originally been imposed. *See* Ark. Code Ann. § 5-4-309(f)(1)(A) (Repl. 2006). Appellant could have originally been sentenced to serve five-to-twenty years on the burglary charge. *See* Ark. Code Ann. § 5-39-201(a)(2) (Repl. 2006); Ark. Code Ann. § 5-4-401(a)(3) (Repl. 2006).[2] Here, the trial court imposed the minimum five-year sentence based on the burglary charge, which was clearly within the statutory range.

III. Pro Se Points

Appellant's *pro se* arguments may be summarized as follows. First, his appellate counsel failed to adequately abstract the record. Second, the State failed to hold his probation hearing in a timely manner, which deprived the trial court of jurisdiction to revoke his appeal. Third, his Fifth, Sixth, and Fourteenth Amendment rights were violated. Fourth, the delay in bringing him to trial prejudiced his ability to properly defend the charges against him. No meritorious appeal would lie based on these arguments, as they are either not preserved for appellate review or are wholly without merit.

A. Inadequate Abstracting

Appellant first asserts that his abstract is inadequate because it "only placed advantage for Prosecution" in that in failed to include *voir dire*, opening and closing arguments, pre–hearing motions, and "all" proceedings regarding this case. This argument is wholly without merit.

---

[2]Both the judgment and commitment order placing appellant on probation and the revocation order incorrectly cite the burglary statute as Ark. Code Ann. § 5-39-202 (Supp. 2007), which is the citation for the breaking or entering statute. However, it is clear that the court meant to cite to the burglary statute because it identifies the offense as a Class B felony and breaking or entering is solely a Class D felony. *See* Ark. Code Ann. § 5-39-202(c).

First, because the revocation proceeding was not preceded by any pre-hearing motion and does not involve a jury, there were no pre-hearing motions or *voir dire* proceedings to abstract. Second, counsel adequately abstracted the revocation proceedings, as the abstract includes the witnesses' testimony, appellant's motions for a directed verdict, his arguments concerning his justification defense, his assertion that he was entitled to a lesser charge, and the trial court's ruling.

While the abstract does not include the attorneys' closing arguments, we examine the record as a whole. *See Campbell*, *supra*. Appellant does not allege and the record does not reveal any error predicated on closing arguments. On these facts, nothing in the manner in which the record was abstracted would present a meritorious issue for appeal.

B. Jurisdiction to Revoke

Appellant raises several arguments related to the trial court's jurisdiction to revoke his probation, which, in turn, are based on the timeliness of the revocation hearing. Appellant was placed on probation on July 17, 1998. His supervised probation will expire no later than July 17, 2008; his unsupervised probation will thereafter expire no later than July 17, 2013. Appellant was incarcerated in an unrelated case from October 2000 until May 10, 2006. The arrest warrant issued due to appellant's probation violation was issued on February 24, 2003, while appellant was incarcerated, but the warrant was not filed until March 20, 2007. The revocation hearing was held seven days later, on March 27, 2007.

Appellant raises three related jurisdictional arguments: 1) the arrest warrant was stale because he was not arrested within one year of its issuance; 2) his "prosecution" was not

timely because he was not prosecuted within one year of the issuance of the arrest warrant; and 3) the trial court lacked jurisdiction to try him because the arrest warrant was not issued within the correct statutory period after the commission of the offense. Although appellant did not raise a jurisdictional argument below, whether a trial court has jurisdiction to revoke probation is an argument that we may address for the first time on appeal. *See Gates v. State*, 353 Ark. 333, 107 S.W.3d 868 (2003).

On the merits, the trial court did not lack jurisdiction to revoke appellant's probation. First, the trial court was not required to conduct appellant's revocation hearing within one year of the date his arrest warrant was issued. Appellant cites to several cases in which criminal prosecutions for certain offenses were not timely brought within their respective statutes of limitations, but none of these cases require a trial court to hold a revocation hearing within one year of the issuance of the arrest warrant based on a probation violation. While a probation hearing must be held no later than sixty days of a probationer's arrest, *see* Ark. Code Ann. § 5-4-310(b)(2) (Repl. 2006), nothing in the statutes governing probation proceedings requires a probation hearing to be brought within any certain time period following the issuance of an arrest warrant. In fact, a trial court may even revoke probation after the probationary period has expired, as long as a warrant was issued for the probationer's arrest before the probationary period expired. *See* Ark. Code Ann. § 5-4-309(e) (Repl. 2006).

Relatedly, the arrest warrant here was not stale because it *was* issued before appellant's probationary period expired. *See* Ark. Code Ann. § 5-4-309(e) (Repl. 2006);

Richmond v. State, 326 Ark. 728, 934 S.W.2d 214 (1996) (holding a bench warrant for the defendant's arrest was not stale, where it was issued within the defendant's five-year probated sentence but not served until 17 months *after* expiration of the defendant's probated sentence). Here, the arrest warrant was issued and the revocation hearing was held *before* appellant's probationary period expired.

Appellant cites to Ark. Code Ann. § 5-1-109(f) (Repl. 2006), which states that a prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or other charging instrument if the arrest warrant or other process is sought to be executed without unreasonable delay. Appellant seems to argue that because he was incarcerated from October 2000 through May 10, 2006, the State knew where he was, and thus, its delay in holding his revocation hearing unreasonably exceeded the time period allowed to prosecute him.

This argument might bear more weight if appellant's probationary sentence was tolled or extended by his imprisonment on another charge. However, that is not the case, as a period of probation runs concurrently with any term of imprisonment to which a defendant is or becomes subject to during the period of the suspension of probation. *See* Ark. Code Ann. § 5-4-307(b)(2) (Repl. 2006). Again, as the arrest warrant was issued and the revocation hearing was held within appellant's probationary period, his argument that the trial court lacked jurisdiction to revoke his probation is wholly without merit.

C. Arguments Not Preserved

For the first time, appellant raises constitutional arguments and further asserts that the

State's delay in prosecuting him prejudiced his ability to properly defend the charges against him. However, we do not address these arguments because appellant failed to present them to the trial court. *See London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003)(declining to address constitutional argument raised for the first time on appeal); *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995) (declining to address the argument that the party was denied the right to defend against a contempt charge where that argument was not made to the trial court). We note that, were we to reach the merits of appellant's constitutional arguments, none would provide a meritorious basis for an appeal.

Affirmed; motion to be relieved as counsel granted.

ROBBINS and MARSHALL, JJ., agree.